Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, *Appellant*,
v.
BYRON BARLOW, JAMES E. BLACKWELL AND JAMES M. DOUGAN, Partners as BYRON BARLOW & CO. — No. 127.

BYRON BARLOW, JAMES E. BLACKWELL AND JAMES M. DOUGAN, Partners as BYRON BARLOW & CO., *Appellants*,
v.
THE UNITED STATES. — No. 128.

BRIEF IN REPLY FOR BYRON BARLOW & CO.

Appellees in No. 127;
Appellants in No. 128.

Tabulation of Amounts Involved.

The discussion of this case will perhaps be facilitated by the following tabulated statement showing the amounts involved in the several items of this case, and what disposition the court made of each:

Finding.		Allowed.	Rejected.
VII (p. 42). Stone quarried, cut and in part delivered	$5,494 45		
Difference between cost of stone actually furnished and what Tenino stone would have cost	15,607 43		
		$21,101 88	
VIII (pp. 42–43). Foundations for boilers and boiler-house			$696 68
XIX (p. 43). Concrete toe		59 35	
X (pp. 43–44). Ramming and sluicing fillings			3,722 70
XI (pp. 44–45). Experiments with water-jet		1,156 76	
XII (p. 45). Delay caused by said experiments		2,625 00	
Total		$24,942 99	$4,419 38
Total amount involved in both appeals			$29,362 37

The Issue.

The main contention of learned counsel for the United States in the able brief submitted by him is that the approval of the stone by the engineer in charge of the work on behalf of the United States, did not constitute a finality, but was subject to a reserved power on the part of the Chief of the Bureau of Yards and Docks of the Navy Department, to reject the stone even though so approved, subject only to the revisory power of the Secretary of the Navy.

It was suggested in our opening brief that the provision upon which the United States rely to defeat the approval of the local engineer, was probably not intended to determine the ultimate rights of the parties, but simply to afford a practical working rule under the contract.

It was further insisted in our opening brief that if intended to go further and prevent the contractors from resorting to their legal remedy in the Court of Claims, it is void as against the provision of the statute conferring

upon the Court of Claims jurisdiction of "All claims founded * * * upon any contract, expressed or implied, with the Government of the United States," Revised Statutes, § 1059; act of March 3, 1887, chapter 359, section 1, 24 Stat. at Large, 505.

Extent of Power of the Engineer.

The current of decision in this court has always been in maintenance of the validity of provisions in contracts designed to secure the judgment of an officer locally in charge of any work of public improvement, and thus enabled by his position on the ground to pass upon the work in a more expert manner and with more ready and intelligent knowledge than a court examining the subject at a remote distance, both of place and time from the transaction involved in the inquiry. For this reason neither party has brought up to this court any sample of the stone in question, nor was any direct finding made by the Court of Claims as to the quality of the stone here in controversy. All the facts which the court does find in regard to it, however, are calculated to lead to the belief that it was in every respect suitable for the purpose for which it was intended, and for which it had been accepted by the engineer in charge. (Finding IV, page 35, next to last paragraph.)

No such considerations apply in favor of the decision of an officer of the Government at a distance from the seat of work, who is no more competent to pass upon the facts than are the courts, and not nearly as competent to decide the questions of law.

As the court said of a provision for reference to arbitrators in *Hasbrouck* v. *City of Milwaukee*, 17 Wis. 266, 290, "Upon all matters arising under the contract which the engineer had power to decide, there could be no disagreement. His decision upon those subjects was absolutely

final and conclusive upon the parties. The contract so declared and provided."

Or, as tersely put by Willes, J. in *Pashby* v. *Mayor of Birmingham*, 18 Scott (Common Pleas), 2, 33: "It is clear that there could be no *res judicata* where there has been no *lis*.

See also *Mason* v. *Bridge*, 14 Maine, 468.

In previous cases, as in *Hawkins* v. *United States*, 96 U. S. 689, the submission of a question arising in the progress of the work to the responsible officer of the Government, has been deemed to be the very thing which fixed and determined the liability of the Government. Here, however, the contention is that the action of the head of the Navy Department, so far from fixing responsibility upon the Government for the work, was the very act which absolved the Government from all responsibility. The argument for the United States goes to the extent of maintaining that after the Secretary of the Navy had decided any or all questions, whether of fact or of law, arising under the contract, no suit would lie in the Court of Claims except in accordance with his award. Upon this ground, it is urged that the petition in this case should, in its entirety, be dismissed.

Well does the Court of Claims in its opinion say (p. 47):

"If the full intent and effect be given to this provision which the defendants now ascribe to it, the contractors might as well have written an agreement on half of a sheet of paper, binding themselves to perform whatever work and furnish whatever material the Chief of the Bureau might require, and accept therefor whatever remuneration the Secretary of the Treasury might be pleased to give them."

In *Nute* v. *Hamilton Mut. Ins. Co.*, 6 Gray (Mass.), 174. the difference between valid and void stipulations is pointed out as follows: The distinction is that conditions

precedent annexed to contracts, such as bringing the action within a certain time, practicing no fraud, making reasonable and true representations of loss, and the like, are merely modifications of the contract, but not the remedy, and are such as the parties may lawfully insert in contracts and insurance policies, but they can not import into such contracts stipulations in regard to the remedy itself, for that is something created and regulated by the law and not dependent upon the contract. The court, by Shaw, C. J., said that the rule was not founded on considerations of public policy alone, but "the greatest inconvenience would result in requiring courts and juries to apply different rules of law to different cases in the conduct of suits in matters relating mainly to the remedy according to the stipulations of parties in forming and diversifying their contracts in regard to remedies," and he enumerates certain stipulations which, if inserted in certain contracts, could not be relied on as a defense to a suit brought for the breach of such contract, viz.: "That in case of breach no action shall be brought; that the party in default shall be liable in equity only and not at law, or the reverse; that in any suit to be commenced no property shall be attached on mesne process, or seized on execution for the satisfaction of a judgment, or that the parties shall never be liable to arrest; that in any suit to be brought on such contract the party sued will confess judgment, or will waive a trial by jury, or consent that the report of an auditor appointed under the statute shall be final, and judgment be rendered upon it, or that the parties may be witnesses, or, as the law now stands, that the plaintiff will not offer himself as a witness; that when sued on the contract, the defendant will not plead the statute of limitations, or a discharge in insolvency," and the like.

The provision there held void was that an action on

the policy should be brought only in the county of Essex. It was held that it formed no bar to an action brought in the county of Suffolk.

In the present case it will hardly be contended that a provision in the following form would be valid: "It is hereby agreed that no suit or action shall be brought in the Court of Claims or any other tribunal against the United States under this contract." Yet, practically, this is what is claimed in the present case.

Smith *v.* Railroad, 36 N. H. 456.

The case of *Smith* v. *Railroad*, 36 N. H. 456, referred to by counsel for the United States (p. 23), clearly draws the distinction here insisted upon. After referring to cases where an impartial third person has been agreed upon as an arbitrator and his award given, and those, on the other hand, where one of the parties reserves the right of decision to himself, the court says (p. 491):

"Between the two classes of cases to which I have adverted, that of an agreement by way of condition precedent to refer matters in difference growing out of some contract, to the decision of indifferent third persons, and the attempt of a party interested in the same way to constitute himself judge in his own case, there is an intermediate class, where the contract requires that all disputes shall be referred, not to the party himself, but to his servant, agent, or employee."

After discussing the legal effect of decisions under such provisions, it concludes (p. 493):

"We think, therefore, it may well be doubted whether the measurement, appraisal, or other decision of a person so situated, that he can not, by any possibility, be regarded as indifferent or impartial, can justly be held to have in any degree the conclusive character of an award."

Ranger *v.* Great Western Railway, 5 H. L. Cas. 72.

The opinion in *Smith* v. *Railroad* proceeds to cite with approval the decision of the House of Lords in *Ranger* v. *Great Western Railway*, 5 House of Lords Cases, 72. Lord Chancellor Cranworth said, of a similar provision there considered (p. 89):

"Where it is stipulated that certain questions shall be decided by the engineer appointed by the company, this is, in fact, a stipulation that they shall be decided by the company."

And Lord Brougham said (p. 115):

"We have here the case, not of a Judge, nor indeed of anything like a Judge; the utmost that he can be said to be is a kind of referee to whom certain matters were, by the agreement of the parties, to be referred, I will not say for his arbitration, but rather for his report and decision."

Agreeably to this view, all measurements and computations made by the engineer were sustained. But the court took its own view of what was work under the contract and what was extra. The Lord Chancellor said:

"The masonry work, as to which this question arises, was either work included in what was to be done for the original contract sums, or it was extra work, to be paid for differently. I collect that it was chiefly of the latter description; but this matter, and the sufficiency of the amount certified, will form proper subjects for discussion in the inquiry which must now take place."

There is no indication of any intent to attribute absolute finality to the decision of the engineer, though the contract provided, in terms very similar to those of the one in this case, that the appellant (p. 75) "shall and will abide by, observe, perform, fulfill and keep, and in all

things obey, the decision in writing of the principal engineer for the time being."

Statutes Referring Questions to Heads of Departments.

There is a long line of decisions by this court holding that a statute referring a specific demand, or class of demands, to the decision of the head of a department or bureau is a purely administrative proceeding, settling no ultimate rights and not constituting a submission to arbitration in any proper sense of the term, even when the claimants appeared before the officer in question and consented to the submission and offered evidence.

DeGroot v. *United States*, 5 Wall. 419;
Gordon v. *United States*, 7 Wall. 188;
Chorpenning v. *United States*, 94 U. S. 397;
Nutt v. *United States*, 125 U. S. 650;
Smithmeyer v. *United States*, 147 U. S. 342;
Medbury v. *United States*, 173 U. S. 492.

If a specific grant by the law-making power itself of jurisdiction to decide on a controversy, or class of controversies, does not contain the element of arbitrament and award so as to make the decision a finality, much less can such finality attach to a decision made in a purely administrative capacity. The case at bar is an excellent instance of the justice of the remark made in one of these cases (*Gordon* v. *United States*, 7 Wall. 188, 195): "An arbitrament and award which concludes one party only is certainly an anomaly in the law."

Can the Courts Be Ousted of Their Jurisdiction?

Counsel for the United States does not hesitate to carry his argument to its logical conclusion. He says (p. 13), "It is submitted that the decision of the question by the Secretary of the Navy is final and conclusive upon the claimants as well as the Government; that it ousts the

jurisdiction of every court over the original cause of action; that no suit can be brought upon the contract," etc. But this conclusion is squarely opposed to the decision of this court in *Medbury* v. *United States*, 173 U. S. 492. It is laid down in that case in accordance with previous decisions therein referred to, that a reference even by statute of a given class of cases to the head of a department, does not prevent a party whose rights have been misconstrued by the executive officer, from coming into the Court of Claims and claiming what is due him, notwithstanding the misconstruction made by the Executive Department of the Government. This ruling is approved and followed in *Dooley* v. *United States*, 182 U. S. 222, where all the cases are reviewed. Surely a provision in a contract providing for a decision of a question by the head of a department, is not entitled to any more liberal construction than a similar provision in a statute. In neither case can the finality attributed to the decision of the executive officer, be regarded as extending beyond the confines of the Executive Department itself.

When the parties come into a court of law to have their rights determined, that determination must be made upon principles of law. It would be a needless proceeding to establish a court for the adjudication of claims against the United States, composed of judges learned in law, and with all the machinery to enable a court to sift and determine questions both of fact and of law, if, in the end, that court can do no more than register the conclusions of an executive officer who has already made a final determination of the rights of the parties.

Decisions Cited for the United States.

Most of the decisions cited by learned counsel for the United States go only to the extent to which those of

this court have gone;—that an engineer or other officer in charge of a specific work may properly be vested with power to pass upon certain specific questions of fact, which can better be settled on the spot than at some other place and time.

An author is indeed quoted (p. 25) as laying it down that even an idiot or lunatic may be made an arbitrator. But an author so enamored with the principle of arbitration as to go to this length may safely be left to class himself as an authority.

Jurisdiction of Courts Can Not be Ousted.

The view of this court of the extent to which stipulations of that kind, even when they go to the extent of being conditions precedent to a right of action may go, is illustrated by the case of *Hamilton* v. *Liverpool Insurance Co.* 136 U. S. 242, where the court said (p. 255):

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country."

Tested by this rule, no provision of a government contract can be sustained, which goes to the extent of substituting the decision of an executive officer upon the question of the ultimate liability of the Government on the contract, for that of tribunals appointed by law to hear and decide claims founded upon Government contracts, to wit, the Court of Claims, and ultimately upon appeal, this court.

Act Authorizing Construction of Dry Dock.

The act of March 2, 1891, 26 Stat. L. 804, cited by counsel for the United States, was indeed a sufficient authority for the Secretary of the Navy to make the contract in suit for the construction of the dry-dock. It

does not, however, either in terms or by any necessary implication, enlarge the general power of the Secretary of the Navy, and invest him with authority to act as arbitrator in any case in which the power to do so was not already vested in him by law.

Amount of Judgment on Stone Item Correct.

In addition to the objections made by counsel for the United States, to this entire item of the claim, it is further objected (p. 38) that the amount of the judgment is too large. Of course, it is not intended by counsel for the United States to challenge the correctness of the amount so far as that depends upon questions of fact. The finding of the Court of Claims is conclusive on that subject. The objection is, in substance, that the court allowed both of the items named (Finding VII, p. 42), as follows:

Tenino sandstone quarried, cut and delivered, 2,349 cu. ft. at 65 c. a cu. ft.	$1,526 85	
Tenino sandstone quarried and cut, but not transported, 7,280 cu. ft. at 65 c. a cu. ft., less the cost of transportation, 10½ c. a cu. ft., 54½ c. a cu. ft.	3,967 60	
Total for stone actually quarried and cut, and part of which was delivered		$5,494 45
Cost of Sucia Island and Dog-Fish Point Stone actually used in construction	33,556 23	
Less what it would have cost the claimants had they been permitted to furnish Tenino stone	17,948 80	
Difference		15,607 43
Total of two items		$21,101 88

The correctness of the allowance of $1,526.85 for Tenino sandstone actually quarried, cut and delivered, is perfectly clear. This stone was furnished and approved before any objection whatever was made to this particular sandstone (Finding IV, p. 37). Hardly less clear is the correctness of the allowance of $3,967.60 for the stone quarried and cut, though not transported to the site of work. This is expressly found to have been done "before receiving notice of the rejection of Tenino sandstone by the Bureau of Yards and Docks" (Finding VII, p. 42). These two items make up the $5,494.45 "for stone actually quarried and cut, and part of which was delivered," representing goods actually furnished. They constitute in effect a claim for goods sold and delivered, which would in a common law action be recoverable under the common counts. They are equally recoverable against the Government upon a *quantum valebant* under the authority of *Clark* v. *United States*, 95 U. S. 539, 542.

It would be an act of bad faith on the part of the Government to permit property to be furnished or services rendered upon the faith of an express contract, and with the approval of an officer clothed with full authority to accept them, and then to deny compensation for them upon the mere ground of a subsequent disapproval of the action of that officer by his official superiors.

This position is not in the least impugned by the finding made by the court, that the claimants have not paid the owners of the Tenino Stone Quarry for the stone, and that it does not appear that any action has been brought against the claimants by them. The owners of the quarry have no privity of relation with the Government; they are in no position to maintain a claim in their own names. Their rights must be worked out through the medium of the principal contractors with the Government, the present claimants. Whatever sum is recov-

ered in this action on this item will undoubtedly be subject to a claim on the part of the owners of the quarry against the claimants for the price of the stone.

The contract between the claimants and the Tenino Stone Company is in this record (p. 36), and binds the claimants to make payment for the stone only "as soon as payment is received therefor from the Government." It was not, therefore, at all necessary that the Tenino Stone Company should sue the present claimants in order to entitle the latter to maintain this action. They were perfecty warranted in awaiting the result of this suit, and then insisting upon these claimants paying them under their contract out of the recovery. *Hobbs* v. *McLean*, 117 U. S. 567.

The remaining item of $15,607.43 is not composed in any part of the items just discussed. That item represents the difference between what it would have cost the claimants to furnish Tenino sandstone and what it actually did cost them to furnish, deliver and cut the stone which actually went into the construction of the dry dock.

The validity of this item depends upon the question whether the engineer in charge of the work was the engineer designated by the contract to pass upon the quality of the stone. If he was so authorized, the whole amount of the judgment rendered by the Court of Claims for this stone is correct. If he was not so authorized, the claimants are in any event entitled to recover the $5,494.45 for the stone which was actually furnished.

Experiment With Water-Jet.

One of the items in dispute in this case was decided by the Secretary of the Navy favorably to the contractors, to wit: That stated in Finding XI, pp. 44, 45,

arising out of experimentation with the water jet and amounting to $1,156.76.

According to the theory of counsel for the United States, the decision of the Secretary of the Navy on this item would be a binding finality. Yet when he reaches that item in his brief, we find a marked abandonment of the theory that the decision of the Secretary of the Navy is conclusive, and a contention supported by elaborate argument that "The Secretary of the Navy had no more authority to waive the provisions of this contract than the humblest laborer employed upon the work" (p. 52).

In all other parts of his argument, it is insisted that the Secretary of the Navy had full power and authority to decide on every question arising under the contract. Here, however, the claim is that the Secretary of the Navy was entirely without authority to order the work in question, or to authorize payment for the same. On the other hand, counsel comes very near conceding, that, if the order had been given by the subordinate of the Secretary of the Navy, the Chief of the Bureau of Yards and Docks, there would have been a modification of the contract by an officer clothed with sufficient authority. This view, however, seems to reverse all principles of legal subordination. True, a local and even inferior officer may be vested with a certain limited authority to pass—and pass conclusively—upon questions of detail, involving the ascertainment of quality and the measurement of quantities of, the materials furnished. So, too, the Secretary of the Navy is not, and can not be, vested with authority to adjudicate the ultimate rights of contractors with his department. When it comes, however, to the making of a mere modification in a contract so as to order work not embraced therein, and to promise to pay for it, a wholly different question is presented.

The Secretary of the Navy is the highest executive authority of the Navy, short of the President; he has full supervisory power over the execution of work in the course of performance under contracts with his Department. Whatever right is vested in any officer of the Government to order extras in such work, is vested in the Secretary of the Navy. When he directed the contractors to experiment with the water jets, and promised to pay them an additional amount for these experiments, he waived the provisions of the contract which required any modification to be made in a particular way. This waiver he had the right to make. There was no statutory provision which stood in the way of a modification. What the Secretary of the Navy had agreed to originally, as to the mode in which the contract might be modified, he had the power to set aside afterwards, and to make the modification in a different way. It is nowhere claimed that he exceeded any general authority vested in him by the act authorizing the construction of this dry dock, or made a promise in excess of the appropriation. It is therefore unnecessary to discuss such cases as *Stansbury* v. *United States*, 8 Wall. 33, and *United States* v. *Garlinger*, 169 U. S. 316, which were cases of suits founded upon promises by heads of executive departments, made in violation of express provisions of statute law. No such case is presented by this record, which presents the simple element of a modification of a provision in a contract by the highest officer of the department with which the contract was made.

Delay in Experimenting.

What we have said under the heading of this item is in most of its parts applicable to the claim stated in Finding XII (p. 45), as to the delay incident to the experimentation with the water jet. The suspension of work caused

by this unsuccessful experiment into which the claimants were forced by the orders of the Secretary of the Navy was $2,625. The Board, which allowed the expense of the work itself, $1,156.76, as shown in Finding XI, failed to recommend an allowance for the expense of delay as shown in Finding XII, for the sole reason that it had no means of verifying the correctness of the amount claimed. The justice of the claim was admitted in principle. The amount of that expense has now been ascertained by the Court of Claims, and no reason is shown why it should not be allowed.

Cross-Appeal of the Claimants.

Our remarks on the items of the claim involved in the cross-appeal of the claimants, being that contained in Findings VIII and X (pp. 42–44), will be confined to a brief discussion of the two cases cited by counsel for the United States in opposition thereto. These cases are *Ferris* v. *United States*, 28 C. Cls. 332, and *Simpson* v. *United States*, 31 C. Cls. 217, the latter of which was affirmed by this court, 172 U. S. 372. In the former of these cases, the contractor imprudently relied upon the orders and representations of the officer in charge of the work and failed to bring the extra work ordered of him by the officer in charge to the attention of the responsible officers of the Government in the Department at Washington. For this reason the claimant failed to recover for any of the extra work which he had done.

In the present case no such objection can fairly be urged. In the case of Finding VIII (pp. 42, 43), it does not indeed appear that the claimants appealed to the Chief of the Bureau before doing the work, or that it was ordered by him. Subsequently, however, the matter was referred to him, and he decided that the work was required to be done by the terms of the contract. Thus it

is plain that the action of the engineer in charge was fully ratified by the Bureau at Washington, so that the question of work having been ordered by responsible officers can not arise.

As to Finding X (pp. 43, 44), the question is even plainer. Here it affirmatively appears by the sentence at the end of the finding (p. 44) that, at the request of the claimants, the engineer ordering the work referred the question of requiring it to the Chief of the Bureau of Yards and Docks, and that the requirement was approved by the Department upon the ground that the contract required it.

In *Pashby* v. *Mayor of Birmingham*, 18 Scott's Reports (C. P.), 2, the syllabus is as follows:

"By the contract it was further provided that if any dispute or difference should arise with the contractors in any way relating to the contract, or if any question should arise between any of the several contractors relating to the proposed building, such dispute, difference or question should be settled by the architect, whose decision thereon should be absolute and final. *Held*, that this condition applied only to disputes as to the mode of carrying on the several works, and not to differences between the contractors and the corporation as to their claim for extras."

Willes, J. said: "I am of the same opinion, as to the second question there is no dispute between the parties; it is clear that there could be no *res judicata* where there was no *lis*" (p. 33).

The case of *Simpson* v. *United States*, 172 U. S. 372, need only be referred to so far as to say that the decision was based in both courts upon the ground that the work performed was simply that required by the contract.

The claim was made that the site upon which the dry dock was built was of a different natural foundation from

what it was believed to be by both parties at the initiation of the work. It was held, however, that the agreement to build the dry dock was absolute, and that the fact that both parties believed the natural foundation of the work to be different could have no effect upon the plain terms of the contract. No such question arises in the present case.

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